



Date Issued: **August 22, 2000**

Case No.: **1997-INA-0182**

In the Matter of:

LUCKY HORSE FASHION, INC.,

Employer,

on behalf of

DI WU HONG,

Alien.

Certifying Officer: Delores Dehaan, Region II

Appearances: John L. Moncrief, Esq.

New York, NY

For Employer and Alien

Vincent C. Costantino, Esq.

Washington, D.C.

For the Certifying Officer

Kenneth H. Stern, Esq.

Stephanie Goldsborough, Esq.

Denver, CO

For American Immigration Lawyers Association,

American Immigration Law Foundation

Before: Chief Judge Vittone, Associate Chief Judge Burke, Administrative Law
Judges Holmes, Huddleston, Jarvis, and Wood

RICHARD E. HUDDLESTON

Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the denial by a U. S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Sewing Machine Repairer." The CO denied certification

on the ground that the job opportunity contains a foreign language requirement which has not been supported by evidence of business necessity as required by § 656.21(b)(2). The decision of the CO was affirmed *per curiam* on March 19, 1998, on the basis of the well established principles set out in *Information Industries, Inc.*, 1988-INA-82 (Feb. 8, 1989)(*en banc*).

Employer filed a request for review by the full Board of Alien Labor Certification Appeals on April 3, 1998. Employer argues that the *per curiam* decision seems to concede that a 100% Chinese speaking work force justifies a Chinese speaking repairer but not a three dialect speaking repairer. Thus, Employer argues that the application should have been remanded to permit amendment and re-advertisement of the job for a repairer who speaks “Cantonese or perhaps Cantonese and Chao Chow.” Employer also argues that the panel decision finds that another worker should be relied upon to translate, and “[t]he fact that a business may have ‘made do’ using another worker to translate is not determinative of ‘business necessity’ if it is an inefficient way to do business.”

On September 29, 1998, we granted the request for *en banc* review concerning the proper way in which to analyze a foreign language requirement(s) where a majority of Employer’s workforce does not speak English, or speaks English plus a common foreign language. We also noticed that this review may require the Board to examine *Information Industries, Inc.*, 1988-INA-82 (Feb. 8, 1989)(*en banc*)(established business necessity test), and *Coker’s Pedigreed Seed Co.*, 1988-INA-48 (April 19, 1989)(*en banc*) (adapted business necessity test to foreign language requirements), and their progeny. We ordered submission of briefs within 90 days, and invited the American Immigration Lawyers Association (AILA) and the American Immigration Law Foundation (AILF) to participate as *amici curiae*. Briefs were filed by the CO, *Amici* AILA and AILF.

Statement of the Case

Employer, Lucky Horse Fashion, Inc. seeks labor certification for the new position of “Sewing Machine Repairer.” Employer required 2 years of experience in the job offered and the ability to speak three Chinese dialects, Chao Chow, Cantonese and Mandarin.

In a Notice of Findings dated September 2, 1996, the CO found, *inter alia*, that Employer’s requirement of fluency in the Chinese dialects of Cantonese, Chao Chow and Mandarin languages was unduly restrictive pursuant to 20 C.F.R. § 656.21(b)(2)(i). Employer was directed to establish business necessity. (AF 32-37)

In its rebuttal submitted on July 9, 1996 (AF 38-64), Employer’s president stated that all of its workers speak a dialect of Chinese, and that nearly all its workers speak very limited English. Employer asserted that the sewing machine repairer would speak one of these three dialects eighty-five percent (85%) of the time. Only ten percent (10%) of its workers can communicate sufficiently in English to establish a problem with a machine. Employer explained that sewing machine repair problems cannot be efficiently explained with sign language--that problems include “angle and depth of needle strokes, feed timing, needle and hook timing, thread timing and reverse feeding.” (AF 59A) Efficiency would be lost, explained Employer, if a

translator was required. Early in the application process, Employer's president had stated that he had to be present to translate for outside repairers--an expensive and time consuming process in a highly competitive business. (AF 1) Moreover, Employer explained that its past experience with outside repairers had been unsatisfactory "partly because of the language problems." (AF 59)

Employer's rebuttal also included the statement of the President of Ching Heung Fashions Corp. indicating that it employs a full time sewing machine operator; that it cannot afford to have a machine down; that outside repairers cannot be relied on to come when called; and that it is important that the repairer speak Chinese "when all of your workers speak Chinese." (AF 58) Similar statements were supplied by the Presidents of Yue Yee Inc., Heung Fook Fashions, and LP Fashions, Inc. (AF 55-57) Finally, Employer supplied an employee list showing the Chinese dialect spoken by each of its employees. (AF 51-54)

The CO issued a Final Determination on July 17, 1996 (AF 65-68) denying certification based on her conclusion that business necessity for the three dialects had not been established. The CO denied certification on the ground that a U.S. applicant was unlawfully rejected. The CO concluded that the applicant was apparently well qualified except for the language requirement. The CO pointed to the fact that Employer had been using outside repairers effectively for a number of years. Employer requested Board review on August 2, 1996. (AF 95-105) Employer's president stated that although he has been able to do business without a Chinese speaking repairer, it was a temporary "make do" situation. (AF 105) Employer's request for review also included a legal brief. (AF 95-102)

Discussion

This matter is before us to review *en banc* the proper way in which to analyze a foreign language requirement(s) where a majority of Employer's workforce does not speak English, or speaks English plus a common foreign language. We also noticed that this review may require us to examine *Information Industries, Inc.*, 1988-INA-82 (Feb. 8, 1989)(*en banc*)(established business necessity test), and *Coker's Pedigreed Seed Co.*, 1988-INA-48 (April 19, 1989)(*en banc*) (adapted business necessity test to foreign language requirements), and their progeny.

The regulation provides at 20 C.F.R. § 656.21(b)(2)(i) that:

- (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
 - (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
 - (A) Shall be those normally required for the job in the United States;
 - (B) Shall be those defined for the job in *the Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs;
 - (C) Shall not include requirements for a language, other than English.

The requirements of subsections A, B and C § 656.21(b)(2)(i) must be read as conjunctive.¹ Thus, job requirements which do not comply with all three subsections A, B and C, are unduly restrictive unless adequately documented as arising from business necessity. Moreover, the regulation specifically provides that a foreign language requirement is unduly restrictive under § 656.21(b)(2)(i)(C). We have addressed the standard for establishing business necessity in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*), as follows:

We hold that, to establish business necessity under Section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. This standard, in assuring **both** that the job's requirements bear a reasonable relationship to the **occupation** and are essential to perform the **job duties**, gives appropriate emphasis to the Act's presumption that qualified U.S. workers are available. An employer cannot obtain alien labor certification by showing that the job requirements merely "tend to contribute to or enhance the efficiency and quality of the business." On the other hand, this standard is not impossible to meet. An employer has the discretion, within reason, to obtain certification for any job whose requirements are directly related to its business, and does not have to establish dire financial consequences if the job is not filled or is filled by a U.S. worker who is not fully qualified.

(Footnotes omitted)(emphasis added).

Although the facts in *Information Industries* did not involve a foreign language requirement, we have held that the reasoning is equally applicable where the offending requirement involves a foreign language. Therefore, an employer may establish business necessity for a foreign language under § 656.21(b)(2)(i), by demonstrating that 1) the foreign language requirement bears a reasonable relationship to the occupation in the context of the employer's business and 2) is essential to perform, in a reasonable manner, the job duties as described by the employer. *See, Coker's Pedigreed Seed Company, (supra)*.

Subsequently, more than 200 panel decisions have been issued in which the business necessity for a foreign language requirement has been considered. Many of these panel decisions have analyzed the case under both prongs of the *Information Industries* business necessity test, *e.g., Wong's Palace Chinese Restaurant*, 1994-INA-410 (Oct. 12, 1995). However, some decisions seem to have focused primarily upon the issue of whether the foreign language is essential to perform, in a reasonable manner, the **job duties** as described by the employer

¹Although § 656.21(b)(2)(i) could have been made clearer by the drafters in regard to whether the requirements of are conjunctive or disjunctive, when read in context the only logical interpretation is that they are conjunctive. Otherwise, the issue of business necessity would never be reached in any job for which a foreign language is not required. Therefore, in order for the business necessity test to be inapplicable, an employer must establish all three elements of Section 656.21(b)(2)(i), that is, that the job requirements are those normally required in the United States, are those in the *DOT*, and do not require fluency in a foreign language. *Information Industries, Inc., infra* at footnote 6.

(second prong of *Information Industries*), without addressing whether the requirement bears a reasonable relationship to the **occupation** in the context of the employer's business (first prong of *Information Industries*). The *per curiam* decision issued in this case cited *Information Industries*, but did not separately analyze the evidence in light of both prongs of the business necessity test.

We consider the issue today, *en banc*, to clarify the proper way in which to analyze the business necessity for a foreign language requirement. In so doing, we emphasize that there must be a two part analysis. First, it must be determined whether a foreign language requirement is shown to bear a reasonable relationship to the **occupation itself**, in the context of employer's business. Second, it must be determined whether the foreign language is essential to perform, in a reasonable manner, the **job duties** as described by the employer.

In considering an occupation, the specific title of the job as defined in the *Dictionary of Occupational Titles (DOT)* must first be determined. Once determined, the *DOT* description of the occupation must be examined to determine if the use of a foreign language is supported. The use of a foreign language is specifically supported for many occupational titles listed in the *DOT*, e.g., Children's Tutor (099.227-010), Tutor (099.227-034), Music Librarian, International Broadcast (100.367-026), Newswriter (131.262-014), Translator (137.267-018); Announcer (159.147-010), etc. In other titles a need to communicate with foreign clients, customers or suppliers is implied, e.g., Import-Export Agent (184.117-022).

However, even if the *DOT* description supports the use of a foreign language, an employer must still establish business necessity because subsections A, B and C § 656.21(b)(2)(i) must be read as conjunctive, and the requirement of a foreign language is unduly restrictive under § 656.21(b)(2)(i)(C). Presumably, such would be easier where the use of the foreign language is at least supported by the *DOT*.

If the *DOT* description of the occupation does not support the use of a foreign language, the employer's burden of proof is compounded. The burden of proof rests with an employer to establish that, nevertheless, in spite of the lack of support for the foreign language in the *DOT* description, in the context of the employer's specific business, the use of a foreign language bears a reasonable relationship to the occupation.

In the instant case, the job offered is that of a Sewing Machine Repairer.² Clearly, the *DOT* neither specifically nor implicitly supports the use of a foreign language in describing the position of Sewing Machine Repairer. Therefore, the Employer bears the burden of proof to

² *DOT* code 639.281-018: SEWING-MACHINE REPAIRER (any industry) alternate titles: sewing-machine adjuster: Repairs and adjusts sewing machines in homes and sewing departments of industrial establishments, using hand tools: Turns screws and nuts to adjust machine parts. Regulates length of stroke of needle and horizontal movement of feeding mechanism under needle. Dismantles machines and replaces or repairs broken or worn parts, using hand tools. Inspects machines, shafts, and belts. Repairs broken transmission belts. Installs attachments on machines. Initiates orders for new machines or parts. May operate machine tools, such as lathes and drill presses, to make new parts. May be designated according to location in which employed as Fitting-Room Maintenance Mechanic (boot & shoe).

establish that the requirement (that the repairer must speak “Chinese Cantonese, Chao Chow and Mandarin”) bears a reasonable relationship to the occupation of Sewing Machine Repairer within the context of the Employer’s business.

In rebuttal to the NOF, Employer submitted a letter by its Attorney (which does not address the foreign language issue), a letter by S. Ho Lee (President of Lucky Horse Fashions, Inc.), a letter by Jack Yu (President of Ching Heung Fashions Corp.), a letter by John Mak (President of YueYee Inc.), a letter by Sau K. Lui (Heung Fook Fashions Cin.C.), a letter by Peter Leung (President of LP Fashions Inc.), and a 6 page document entitled “Employee List, Lucky Horse Fashions, Inc. The list contains names of employees, social security numbers, hourly wage, and the dialect of Chinese spoken by each employee.

Employer’s President states that 100% of the people the worker (repairer) will deal with speak a dialect of Chinese; that none speak English as a first language; that maybe 10% can communicate in English sufficiently to explain a problem with a machine; that the worker will spend an estimated 85% of the time speaking one of the three dialects of Chinese; and that the absence of the language ability would make the worker less efficient and cost the time of another worker to translate. Each of the letters from other companies (presumably competitors), essentially state that it is important to have a repairer who speaks Chinese when all of the workers speak Chinese. Thus, Employer’s rebuttal argues that business necessity is shown solely because **co-workers** of the job applicant do not speak English.

However, a very significant distinction must be drawn between an employee’s need to communicate with “clients, contractors and customers” and his need to communicate with “co-workers.” Communication in a foreign language with “clients, contractors and customers” may clearly be related to the occupation itself, as in *Coker’s Pedigreed Seed Company*, (*supra*), if a substantial portion of the employer’s business involves speaking the language.³ The job opportunity in *Coker* was that of a “Senior Soybean Breeder” with duties that required travel and work in Brazil and other parts of South America. There, the first part of the *Information Industries* business necessity test was established because the employer had established that a substantial portion of the employer’s business was performed in a foreign language in Brazil and Argentina. Similar results were reached in *Construction and Investment Corp., dba Efficient Air*, 1988-INA-55 (April 24, 1989) (*en banc*) (business necessity established for sales and marketing director who must deal in Arabic with Middle Eastern clients); *Tel-ko Electronics, Inc.*, 1988-INA-416 (July 30, 1990) (*en banc*) (business necessity established where employee must deal with Korean suppliers of electronic equipment). However, each of these cases involves the use of a foreign language to communicate with clients, contractors or customers, not solely to communicate with co-workers. While there are situations in which business necessity could be established based upon a foreign speaking workforce (*e.g.*, *Wong’s Chinese Restaurant*, *supra.*, and cases cited therein), such cases are few and are dependent upon satisfaction of both prongs of the *Information Industries* business necessity test.

³ To the contrary, if only a small portion of the employer’s business involves persons speaking a foreign language, this may be insufficient to establish business necessity. Cf., *Weidner’s Corporation*, 1988-INA-97 (November 3, 1988) (*en banc*); *Best Roofing Company, Inc.*, 1988-INA-125 (December 20, 1988) (*en banc*).

In the instant case, we have an employer whose business establishment is in the United States; there is no evidence of a need to communicate with clients, contractors and customers who do not speak English in the U.S. or any other country; there is no evidence of a need to travel to foreign countries to conduct business; there is no evidence of a need to communicate with non-English speaking employees in other countries; and there is no support for the use of a foreign language in the *DOT* position description for sewing machine repairer.

An employer's burden to overcome the specific exclusion of the use of a foreign language in § 656.21(b)(2)(i)(C) is not easily met. By specifically excluding the use of a foreign language, it is clear that the drafters of the regulation intended that such requirements be given special scrutiny. This is especially true where the language spoken by co-workers has nothing to do with the occupation itself and where the only justification offered is that the foreign language is required in order to communicate with co-workers. The result of permitting an employer to establish business necessity for a foreign language, solely because all of its employees only speak a foreign language is to create a self-perpetuating foreign labor force that, as a practical matter, excludes all but a few U.S. workers, contrary to the purposes of the Act.

In the instant case, Employer's job requirements include the use of a foreign language. Therefore, under § 656.21(b)(2)(i) Employer must establish the business necessity of the foreign language requirement. Under *Information Industries*, Employer must first establish that the use of a foreign language bears a reasonable relationship to the occupation of sewing machine repairer within the context of its business. The *DOT* job description for the occupation of "sewing machine repairer," neither explicitly or implicitly supports the use of the Chinese language (whether it is one dialect or three dialects). Employer has submitted no evidence to establish that the use of a foreign language is normal to the occupation of sewing machine repairer. The Employer's only evidence presented in rebuttal is that a high percentage of his workforce does not speak English.

We hold that this evidence, standing alone, does not establish that the use of any dialect of the Chinese language bears a reasonable relationship to the occupation of sewing machine repairer within the context of Employer's business. Therefore, Employer has not satisfied the first prong of the *Information Industries* business necessity test.⁴

This decision must not be read as creating a rule that requires employers to hire only English speaking employees, or to conduct business in the English language, unless it can

⁴ It would not be inappropriate for the CO to require an Employer to provide evidence of the business related reasons that none of his other employees speak English. For example, an employer who does not pay prevailing wages or who hires illegal aliens, should not be permitted to use the fact that his workforce speaks no English as the basis to obtain labor certifications. However, the dissent appears to place the burden of proof upon the CO to establish that an Employer's non-English speaking workforce is grounded in violations of immigration or labor laws. To the contrary, the burden of proof must always remain with an Employer to overcome the specific exclusion of the use of a foreign language in § 656.21(b)(2)(i)(C). This finding must not be construed as holding that business necessity can never be established based upon evidence of a non-English speaking workforce. However, an Employer who relies solely upon evidence that his existing workforce does not speak English, without evidence that such is the result of lawful market forces, does not carry his burden of proof that the job bears a reasonable relationship to the use of a foreign language.

establish business necessity for not using English. To the contrary, because of the specific exclusion of job requirements for a language other than English in § 656.21(b)(2)(i)(C), foreign language requirements must be given special scrutiny. We clarify that when applying our decision in *Information Industries* to the consideration of the business necessity for a foreign language requirement, both prongs of the business necessity test must be satisfied. Such analysis must first determine whether an employer has established that its foreign language requirements bear a reasonable relationship to the **occupation** itself, rather than focusing solely on whether the language requirement is necessary to perform the **job duties**.

We also do not disagree with the findings in the *per curiam* decision, that Employer has not established that its requirements (that the sewing machine repairer must speak three dialects of the Chinese language) are essential to perform, in a reasonable manner, the **job duties** as described by the Employer. However, the finding in the *per curiam* decision (“Thus, it is not credible that a sewing machine repairer who only speaks Cantonese, or Cantonese and Chao Chow could not perform the job duties in a reasonable manner”) could be read as implying that if Employer had required less than three dialects of Chinese, such might have been acceptable. Indeed, Employer has made a request for a remand to reduce the requirement to only one dialect of Chinese in response to the *per curiam* decision.

However, as we have found that Employer has not first established that its foreign language requirement is reasonably related to the **occupation** of sewing machine repairer, under prong one of *Information Industries*, a remand to reduce the number of required dialects could not cure this defect.

For the foregoing reasons, the following Order shall issue.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

For the Board:

RICHARD E. HUDDLESTON
Administrative Law Judge

JOHN M. VITTONE, Chief Administrative Law Judge, concurring in part, and dissenting in part. Associate Chief Judge Thomas M. Burke joins in this concurrence/dissent.

The majority holds that the Employer's evidence of a non-English-speaking workforce, standing alone, is insufficient to establish that the use of any dialect of the Chinese language bears a reasonable relationship to the occupation of sewing machine repairer within the context of Employer's business, and therefore fails to satisfy the first prong of *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*), business necessity test. The majority's rationale for imposing this level of scrutiny on foreign-language-speaking-workforce justifications is the finding that "[t]he result of permitting an employer to establish business necessity for a foreign language, solely because all of its employees only speak a foreign language is to create a self-perpetuating foreign labor force that, as a practical matter, excludes all but a few U.S. workers, contrary to the purposes of the Act."⁵

While the Department of Labor should not ignore the potential for abuse of foreign language requirements in alien labor certification cases, it should also recognize that there are many times when a workforce with poor English language skills is an economic or sociological reality rather than an improper creation of an enclave of foreign-born workers to the exclusion of U.S. workers.⁶ For example, an employer running a business in a geographic location heavily populated by recent immigrants may have such a difficult time staffing with workers who are even minimally proficient in English that bilingual supervisors or other staff are essential. In addition, there are circumstances in which an employer may have with a poor English-language-proficiency workforce, but be in full compliance with immigration and labor laws -- for example, employers taking advantage of the H-1A and H-2A visa categories. In those circumstances, some permanent positions may reasonably require a multi-lingual supervisor or other staff.

Thus, I do not agree that special scrutiny beyond the normal business necessity test stated by *Information Industries* is mandated when an employer presents a business necessity justification of a non-English speaking workforce. All that prong one of *Information Industries* requires is a showing that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business. If the employer's workforce has poor English language skills, and the occupation requires communication with the workforce, it appears on its face that there is a reasonable relationship between the foreign language requirement and the occupation *in the context of the employer's business*. At that point, a Certifying Officer may reasonably inquire into the circumstances under which a poor English-language-fluency workforce was created.

⁵No regulatory history exists that would explain the Department of Labor's reason for expressly setting out foreign language requirements as presumptively unduly restrictive, and therefore requiring a showing of business necessity. It is not clear to me that prevention of self-perpetuating foreign work forces is the target of the regulation. In *Posadas de Puerto Rico Associates, Inc. v. Secretary of Labor*, 698 F.Supp. 396 (D. Puerto Rico 1988), for example, the court stated that the purpose of the requirement that an employer establish the business necessity of a foreign language requirement is to prevent an employer from "evading the congressionally mandated preference for U.S. workers by tailoring the job requirements to the alien's qualifications." This language from *Posadas* was quoted with approval in *Hall v. McLaughlin*, 864 F.2d 868, 875 n.8 (D.C. Cir. 1989).

⁶There is no evidence in the instant case that Lucky Horse's workforce are not U.S. workers.

See Gencorp, 1987-INA-659 (Jan. 13, 1988) (*en banc*). The CO has the discretion to make this inquiry because if the reason for the non-English speaking workforce is grounded in violation of immigration, labor or other laws, then a reasonable relationship to the occupation in the context of Employer's business does not exist. If the CO, however, does not suspect that an improper basis underlies the foreign-language-speaking workforce and does not raise the issue, then I would hold that the poor English-language skills of a workforce is sufficient, by itself, to meet prong one of *Information Industries*.

Thus, the primary difference between the majority decision and this dissent is that the majority places an affirmative burden on all employers in all cases to introduce evidence beyond the simple fact that its work force is not proficient English to meet prong one of *Information Industries*, while this dissent would recognize that in many cases, poor English language proficiency of the workforce may itself be sufficient to establish a reasonable relationship between the occupation and the foreign language requirement in the context of the employer's business.

In the case *sub judice*, I would hold, based on the record presented and the absence of a challenge to the circumstances resulting in a poor-English-proficiency workforce, that Employer introduced sufficient evidence to establish prong one of *Information Industries*. Nonetheless, as the *per curiam* decision found, Employer's evidence was not sufficient to establish the business necessity for requiring three dialects of Chinese under prong two of *Information Industries*. Thus, I join the majority decision insofar as it affirms the panel decision on this ground.